IN THE

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 26.

ALLEN POPE, PETITIONER,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
Attorneys for Petitioner.

TABLE OF CONTENTS.

CITATIONS.

CASES.

MISCELLANEOUS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 26.

ALLEN POPE, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

Opinion.

The opinion of the Court of Claims (R. 47-61) is now reported (100 C. Cls. 375).

Judgment.

The judgment of the Court of Claims was entered January 3, 1944, 100 C. Cls. 375 (R. 60). A petition for writ of certiorari was filed February 10, 1944, and was granted April 3, 1944.

Jurisdiction.

The jurisdiction of this Court rests upon Section 3(b) of the Act of February 13, 1925, as amended.

Question Presented.

Whether the Special Act, Private Law No. 306, 77th Congress, approved February 27, 1942, 56 Stat. 1122, is

constitutional; i. e., whether it was a constitutional exercise by Congress of its legislative function and not an infringement of any judicial prerogative under Article III of the Constitution.

Statutory Provisions Involved.

The Special Act referred to was in terms as follows:

"AN ACT.

"To confer jurisdiction upon the Court of Claims to hear, determine and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and to omit timber lagging from the side walls of the tunnel; and for the

work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

"Approved, February 27, 1942."

Statement.

Petitioner at one time had a contract (R. 9-46) for the building of a tunnel forming a part of the water supply of the City of Washington, and in connection with that contract a number of controversies arose between him and the United States, represented by the contracting officer. Not being satisfied with the determinations made by the contracting officer or by the "Head of Department" the Chief of Engineers on appeal, he brought suit in the Court of Claims, and after a lengthy litigation, in which a large record was made, he was awarded judgment for part or all of *some* of the claims asserted, but not nearly all, the allowance amounting only to $45,174.46. After repeated

motions for new trial and an attempted certiorari the amount of the judgment so awarded was appropriated by Congress and paid to petitioner.

In a final motion for new trial, the court ruled (86 C. Cls. 18, 19) as follows:

> "We discussed in 81 Court of Claims 658 our inability to grant the new trial, asked for, and we are convinced now, as we were then, that the Court is without jurisdiction to grant a new trial. The issue of jurisdiction is the vital one now before the court.
>
> • • • •
>
> "The remedy available to plaintiff, in our view of the present status of the record, resides exclusively in Congress and in Congress alone. The court is without jurisdiction to grant plaintiff's motion, and it is overruled."

In this status, his claims fully barred from further action (Judicial Code, Secs. 178, 179, U.S.C.A., Title 28, Secs. 285, 286) there was introduced in Congress a bill for his relief, which, after hearings before the appropriate committees of the House and Senate, in which *both* sides, not *one*, were represented, there was enacted into law, the Special Act above quoted. (See Committee Report No. 865, 77th Congress, 1st Session, on H. R. 4179, which later became the Special Act now involved, wherein the then Attorney General, now Mr. Justice Jackson, after reviewing the provisions of the bill, said:

> "Whether or not the bill should be enacted is a question of legislative policy as to which I prefer not to make any suggestions.")

Under this Special Act petitioner brought a *new* suit in the Court of Claims on July 7, 1942, not for "rehearing" of the old case, but for a total of $162,616.80 on a *new* cause of action, comprising the following items:

1.	(a) Excavation of caved-in materials between the lines shown on the drawings and the lines as changed which was 3 inches	$ 969.00
	(b) Excavation of caved-in materials from the side walls due to omission of specified wall lagging	4,879.00
	(c) Filling caved-in spaces with concrete	4,879.00
2.	Excavation of caved-in materials from over the tunnel arch (this item alone is discussed in the opinion of the Court of Claims (R. 55-57)	81,277.00
3.	Filling caved-in spaces over the tunnel arch with dry packing	14,240.70
4.	Filling dry packing in overhead caved-in spaces with grout	56,372.10

All these items of claim except "2" (excavation of caved-in materials over the tunnel arch) had been included in the original suit and not allowed, because the work, as done had been allegedly under *oral* not written orders, or for other reasons. Item 2 had been made on a different basis—a claim alleging false representation of subsurface conditions had been made. On such basis the claim had been rejected. This item of claim thus rejected is, under the Special Act on a different basis: Was the work performed, has the Government had the benefit thereof, has it been paid for?

The Special Act directed the consideration of all these items, as a new cause of action, on the evidence in the *old* case plus any *new* evidence that might be taken *on the basis that the work had been performed, that the Government had received the use and benefit thereof, and that the same had not been paid for.*

Some additional evidence was taken tending to establish the last named prerequisite particulars—that the work had been done under orders, that the Government had had the use and benefit thereof, for which it had not paid.

The case under the Special Act was dismissed by the

Court of Claims without findings of fact on the ground that notwithstanding the waiver of prior adjudication, lapse of time, etc., included in the Act, Congress could not properly direct the Court, even with the addition of *new* evidence, "to hear, determine and render judgment" on claims that had *theretofore been heard and decided by the Court.* It is to be observed that the published report of the case, 100 C. Cls. 375, includes a variety of "History", etc., that was not a part of the court's decision, and to the correctness of which petitioner has had no opportunity to except. The official record is as reported officially, R. 47-61. The published "record", 100 C. Cls. 375, is not the record for consideration by this Court.

Specification of Errors.

Petitioner says that the court erred:

1. In holding that the Special Act was an unauthorized legislative direction as to the basis for deciding the claim involved.

2. In holding in effect that the special Act was unconstitutional and void as an unauthorized direction by the Congress of a judicial function.

3. In failing to render a judgment on the claims; i. e., in dismissing the petition of the petitioner based on the Special Act.

Summary of Argument.

I. In its order granting *certiorari* herein the Court says:

> "Counsel are requested to discuss in their briefs and on oral argument the question whether the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a nature to admit of review by this court under Article III of the Constitution."

The question thus propounded naturally must head the list of matters for present discussion. Or stated in other

words, does the Special Act give the Court of Claims a task requiring the exercise of *judicial* "power" or functions?

Article III of the Constitution provides that

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

and further:

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the *laws* of the United States, and treaties made, or which shall be made, under their authority." (Italics added).

No other provision of the Article would seem to have any bearing on the immediate question. The Court of Claims is one of the "inferior courts" created by Congress, not by virtue of Article III but under other provisions. The power and authority of the Supreme Court is, of course, to be found in large part in this Article.

It would seem that the question now of moment is not so much raised or controlled by the specific language of Article III of the Constitution as by a long line of decisions construing the power of the courts thereunder, the effect of which is that the Supreme Court *may not* review the decision or opinion of a subordinate court on a matter not involving the exercise of a judicial action or function. The question now is, it would appear, did the Special Act here involved confer a *judicial* or a *non-judicial* function upon the Court of Claims; that is to say, did it prescribe for decision matters that are reviewable by this Court under Article III?

It is petitioner's view that the action called only for the exercise by the Court of Claims of judicial functions and is therefore of a nature to permit review by this Court under Article III of the Constitution.

II. The lower court having in effect decided that the Special Act is unconstitutional, it is, regardless of other considerations, for this Court to review *that* decision. This Court has the final word on such a subject.

III. The Special Act is constitutional and proper in so far as it directs the Court of Claims to do thus and so, even if possibly unconstitutional in so far as it attempts, if it does, to prescribe the duty of this, the Supreme Court, to review.

Petitioner will limit his argument to the lines indicated. He will assume, without argument, on the authority of many decided cases, that the Supreme Court may not properly be called upon to review a question decided by a lower court which is of a *non-judicial* character; in other words, that this Court may not properly be directed to review a decision of a subordinate tribunal which does not involve the exercise *of a judicial function.*

The crucial question, stripped of all surplusage of words, would seem to be: Does the Special Act go beyond what the Congress, under Article III of the Constitution, may prescribe for the Court of Claims? The petitioner says it (the Act) is not void for such or other account.

Petitioner will further take the position that the Special Act here involved was an exercise by Congress of its right to create a new cause of action against the United States where none existed before, and that the Special Act here involved merely sends a cause of action so created to the Court of Claims for determination and judgment along the lines and on a basis thereby indicated. He will say that the action of the Court of Claims in pursuance of such direction (1) is a matter properly reviewable by this Court, or (2) if not so reviewable, was, in any event, a proper direction to the Court of Claims.

ARGUMENT.

I. *The action authorized by the Special Act involves the exercise by the Court of Claims of judicial functions and hence is of a nature to admit of review of this Court.*

Judicial Function.

What is a "judicial function"? The term is so generally understood that the courts have but infrequently defined it. A short and understandable definition is that when it becomes necessary (for a court) to *determine* a question of fact or law, the act is "judicial", i. e., calls for the exercise of a "judicial function."

In *Crossen* v. *Wasco County*, 10 Oregon 111, 116, it was ruled that a county court exercises "judicial functions" when it makes its order, or decision in allowing or rejecting claims which it is invested by statute with the special duty or authority to annul or allow.

In *Lyon* v. *City of Payette*, 38 Idaho 705, the term "judicial function" was defined as being the hearing of an action pending between adverse parties, applying the law to the facts and making and rendering a judgment determining the rights of the parties.

In *Hamma* v. *People*, 42 Colo. 401, a leading case, it was said that "when an officer acts in both a judicial and ministerial capacity, he may be compelled to perform the ministerial acts in a certain way, but when he acts in a judicial capacity he can only be required to proceed; the manner of his doing so is left entirely to his judgment."

In *Hearst Publications* v. *National Labor Relations Board*, 136 Fed. (2d) 608, 612, it was said that the determination of the meaning of a particular term "employee", as used in the National Labor Relations Act, is exclusively the exercise of a "judicial function."

In *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 240, it was said:

"In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

"A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301; *Fairchild* v. *Hughes*, 258 U. S. 126 129; *Massachusetts* v. *Mellon*, 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See *Muskrat* v. *United States*, *supra*; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162; *New Jersey* v. *Sargent*, 269 U. S. 328, 339, 340; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *New York* v. *Illinois*, 274 U. S. 488, 490; *Willing* v. *Chicago Auditorium Assn.*, 277 U. S. 274, 289, 290; *Arizona* v. *California*, 283 U. S. 423, 463, 464; *Alabama* v. *Arizona*, 291 U. S. 286, 291; *United States* v. *West Virginia*, 295 U. S. 463, 474, 475; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324."

Surely to *take evidence* and *hear and decide* a given claim as directed by the Special Act can be nothing other than the exercise of a "judicial function" as defined in the cases above mentioned.

In *Mitchell Coal & Coke Co.* v. *Pennsylvania Railroad Co.*, 230 U. S. 247, legislation was said to consist in laying down laws or rules for the future while a "judicial function" is

confined to injunctions, etc., preventing wrongs for the future and judgments giving redress for those for the past.

The Special Act is entitled "An Act to confer jurisdiction upon the Court of Claims to *hear, determine, and render judgment*" upon certain specified claims of the petitioner not to *rehear* or *retry* old claims, and provides "That jurisdiction be, and the same is hereby conferred upon the Court of Claims" to do just this. The claims so referred were barred except for the Act, both by the statute of limitations, *res judicata*, and by the acceptance of payment. All these defenses were waived by the Act and *a new cause of action* was created.

What is Jurisdiction?

Jurisdiction is the power to decide a case either way, as the merits may require. *United States* v. *Arredondo*, 6 Pet. 691; *Cooper* v. *Reynolds*, 10 Wall. 308; *The Fair* v. *Kohler Die and Specialty Co.*, 228 U. S. 22; *Erickson* v. *United States*, 264 U. S. 246.

Of its own jurisdiction, the Court of Claims in *Gordon* v. *United States*, 26 C. Cls. 307, 309, said:

> "The jurisdiction of the court is subject to the will of Congress, the court not having a constitutional grant of judicial authority; and whatever statutes may be in force at the time a case is adjudicated measure the jurisdiction of the court in the discharge of its official duty. There can be no vested right in the remedial process of the law; it is subject to change at the will of the legislature, whose discretion as expressed in the statutes marks the boundaries of the power of the court."

The case was appealed to the Supreme Court, 2 Wall. 561, where it was dismissed for want of jurisdiction with the comment "that the reasons which necessitated this view might (may) be announced hereafter."

In 117 U. S. 697, an opinion, written by Chief Justice

Taney, and approved after his death by the surviving judges, gave the reasons. It was therein said (704, 705):

> "And it is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court.
>
> "Indeed no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."
>
> • • • • • •
>
> "The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI, the laws of Congress are made the Supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the Xth amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people."

In *Western Cherokee Indians* v. *United States*, 27 C. Cls. 1 (affirmed 148 U. S. 427), it was said (p. 36):

> "And if the enactments above quoted stood alone, it is possible that we might reach the conclusion that Congress intended here to invest the court with extra-judicial power. But the jurisdiction of the Supreme Court, defined by the Constitution, is strictly judicial, and statutory authority can neither take away from nor add to the inherent powers of that tribunal (*Gor-*

don's Case, 2 Wall. R. 561; 7 C. Cls. R. 1; 117 U. S. R. 697; Klein's Case, 13 Wall. 128). The statute which confers this jurisdiction likewise provides that whatever judgment may be rendered, whether for the claimants or the defendants, may be appealed to the Supreme Court."

* * * * *

"The questions, therefore, to be determined in this court are necessarily questions which may be reviewed in the Supreme Court, and the 'unrestricted latitude' conferred by the statute 'in adjusting and determining the said claim' must be deemed the unrestricted latitude of a court of equity in stating an account, distributing a fund, and framing a decree so comprehensive and flexible as to secure to each suitor his joint or individual rights."

The case of *United States* v. *Klein*, 13 Wall. 128, was much relied upon by the lower court as authority for the position it took with reference to the Special Act here in question. As said by Judge Littleton, dissenting, the conclusion in that case has no controlling application to the present one. In that case Klein had been awarded a judgment by the Court of Claims and an appeal had been taken by the United States to the Supreme Court. While this appeal was pending, Congress passed an act intended to nullify the effect of pardons (a basis for the judgment) theretofore granted by the President under lawful authority.

This act provided that where suit had been brought in the Court of Claims for the recovery of abandoned or captured property under an earlier act, and the claimant had accepted a pardon, "such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof

of such pardon and acceptance "the jurisdiction of the court in the case shall cease," etc., and the court will dismiss the suit of such claimant.

After reciting pertinent acts and the history of the Court of Claims up to that time (1871), the Court said (pp. 145-147):

> "The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court.
>
> "Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.
>
> "But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of

pardon or acceptance, summarily made on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause, for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

* * * * *

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

"It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. 'The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make.'

"Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."

It is to be observed that neither in the court's quotation from the decision of the *Klein* case (R. 51, 52) nor in the quotation we have made, *supra*, appears one paragraph

that has particular application to the situation here existing. It is as follows (13 Wall. 146):

> "We do not at all question what was decided in the case of *Pennsylvania* v. *Wheeling Bridge Company*, 18 Howard, 429. In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance, and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us (the *Klein* case) no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."

In the present case, petitioner, as the law then existed, had completely exhausted whatever legal rights and remedies he had and Congress thereupon enacted this Special Act giving him a new cause of action. Whether the court below was right in its decisions in the old case, as the law then stood, is a matter quite aside from any present issue. The rights of the petitioner are as created by the Congress under the Special Act. Congress is authorized under Article I, Section 8, Clause 1 of the Constitution to pay the debts and obligations of the Government. It has here validated an obligation, with jurisdiction to the Court of Claims to determine the amount thereof. It has not attempted to prescribe how the court shall exercise a judicial function. It has merely given it authority, previously non-existent, to exercise such jurisdiction.

There can be no doubt that Congress had the *right* to confer the jurisdiction it conferred in the present case. It would appear plain that the exercise of that jurisdiction

calls for the performance by the Court of Claims of certain acts constituting the exercise of judicial functions and is therefore reviewable by this Court.

The Special Act—Does it Restrict Judicial Prerogative?

It is not to be denied that the Special Act is broad in its terms. But, it is submitted, that performance by the lower court of the directions of Congress calls for the exercise by such court of definite judicial functions.

1. It is stated by the court that it is directed to determine and render judgment on a specific basis, i. e., at "contract rates", and it is intimated that performance of this direction would be merely a *ministerial* and not a *judicial* act. This, it is urged, is not correct.

In *The Indians of California* v. *United States*, 98 C. Cls. 583 (certorari denied, 319 U. S. 764), the Special Act directed judgment for lands taken, if found taken, "at $1.25 per acre". The court (p. 599) said of this:

> "The amount of recovery has been almost definitely defined. The land which is described in the respective treaties is to be valued at a fixed price. * * * The value per acre is fixed in the jurisdictional act and it is only necessary to ascertain the number of acres * * * ."

The court held plaintiffs entitled to recover under the act. The Supreme Court denied certiorari. Surely the present act no more fixed the basis or limits of the jurisdiction of the Court of Claims than was there done.

The direction "to determine" necessarily indicates that there is to be an examination of the facts and the application of the "contract rates" to whatever quantities of materials the court may, upon the evidence, determine to be correct. Similarly under the present act the court is to determine certain requisite facts as to whether the work covered by the asserted claims was performed, whether the Government has had the use and benefit thereof, and whether the same has been paid for. The provisions of

Section 3 of the Special Act are not to be overlooked in this connection. The Court of Claims is there directed to "consider as evidence in such suit any or all evidence theretofore taken by either party," in a specified case "together with any *additional evidence* which may be taken." The *taking of evidence and weighing the same is not a ministerial function, but is purely and exclusively a judicial function.*

The case of *Menominee Indians* v. *United States*, No. 44298, decided by the Court of Claims February 7, 1944, and not yet appearing in any published report, would appear to bear out what is said above. There, a Special Act, approved September 3, 1935, (49 Stat. 1085) as amended by a supplemental Special Act dated April 8, 1938 (52 Stat. 208), gave elaborate and detailed instruction to the Court of Claims as to the basis for considering certain claims asserted by the Indians on various accounts. Although this decision was later than that in the *Pope* case, the court there made a conclusion, which if applied in the *Pope* case, would have resulted in a *judgment* in Pope's favor instead of a dismissal of the action because of alleged unconstitutionality of the Special Act.

The court said:

> "We have no doubt that special acts of Congress, and even though retrospective in their operation, are constitutional, if they confer rights on private litigants against the Government, which rights are intended by Congress to fulfill a legal or moral obligation of the Government. See *Indians of California* v. *United States*, 98 C. Cls. 583, 599. We have no problem here, such as the Supreme Court of the United States had in the case of *United States* v. *Klein*, 13 Wall. 128, of an attempt by Congress, by the enactment of a statute while litigation was pending, to control the court's decision. This court dealt with a similar problem in the case of *Allen Pope* v. *United States*, No. 45704, decided January 3, 1944, where the statute attempted to direct the rehearing, and the decision in a specified manner.

of a case in which a final judgment had already been rendered."

It is to be observed that the Special Act here involved does not attempt "to direct the *rehearing*, and the *decision* in a specified manner." The act merely refers certain specified claims for trial and determination. It limits the number of items of work that may be sued for and the maximum quantities of such items. It does not in any way prescribe how the judicial discretions shall be exercised nor does it any more than in the *Menominee* case direct the manner in which the *basis* for a judgment is to be legally arrived at. It is to be observed furthermore that in the *Menominee* case, Section 5 of the Special Act, gave "the absolute right of appeal (not by writ of certiorari) from any final judgment entered by the Court of Claims to the Supreme Court of the United States, and the Supreme Court of the United States is hereby invested with jurisdiction of such appeals." What difference, if any, can there be in legal effect from this provision and that giving the parties the right *to apply* for a writ of certiorari as in the Pope case?

2. It is next intimated by the lower court that the direction "the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings" is a definite and precise prescription, both as to the *method* of establishing certain facts and as to the *weight* to be accorded certain evidence pertaining thereto, leaving the court only the ministerial function of "rubber-stamping" what has already been done.

It would seem that the lower court has not well understood the intendment of the Special Act or the language used. The purpose of the Act is reasonably plain. It was to create a new cause of action and to give to the Court of Claims jurisdiction, previously exhausted as to similar items, to hear and determine them. It did not, as indicated by the Court of Claims in *Menominee Indians* v. *United*

States, No. 44298, decided February 7, 1944, "direct the *rehearing*" or direct a "decision in a specified manner of a case in which a final judgment had already been rendered." The *old* case was ended—a *new* one was created.

In prescribing how the *amount* of dry packing was to be arrived at, the Congress was not dictating as to method or amount, but was stating only a scientific fact that the court should here take into account, as it did in the *old* case where the court adopted *the liquid* method of measurement as the only possible method to be followed. It is not believed that anything in the language to which the lower court seems to take umbrage can be found subject to any valid objection as an interference with the orderly exercise of a judicial function regularly exercised by the court.

Congress has power to create obligations where none previously existed that are binding upon the United States. In *Indians of California v. United States*, 98 C. Cls. 583, the Court of Claims itself recognized this fact, saying (p. 599):

> "It is in the power of Congress to grant any kind of relief which its wisdom dictates. There have been many instances of the recognition of moral claims, even gifts and bounties. Under its general jurisdictional powers the Court of Claims cannot pass on a moral claim, nor can it recognize a case sounding in tort. *Radel-Ouster Co. v. United States*, 78 C. Cls. 816; *Mansfield et al. v. United States*, 89 C. Cls. 12; *Stubbs v. United States*, 86 C. Cls. 152. But the Congress has repeatedly sent tort cases to this Court for adjudication under special jurisdictional acts. The Congress can confer on this Court jurisdiction to determine any sort of claim which the Congress has converted into a right of action." *United States v. Realty Co.*, *supra*."

That is exactly what Congress has done in this Special Act. It has, on the basis that the work was performed, that the Government has had the benefit thereof, and has not paid therefor, recognized the existence of moral or equitable obligations, and has transformed these into obligations

which are binding upon the Government. Congress has then conferred jurisdiction upon the Court of Claims to hear and determine the rights of the parties upon the basis of the obligations so created by it.

3. There are certain other functions involved in compliance with the Special Act that call for the exercise by the Court of Claims of definite *judicial* functions as distinguished from *ministerial* actions. It must be ascertained, first, that the work involved in the claims was performed by petitioner; second, that it has not been paid for; and third, that the Government has received the use and benefit thereof. Certainly these are *ultimate* facts which the court is given authority—a judicial power—to determine. This determination, a judicial function, the court has failed to make. The court has here made no findings of fact as showing this or other pertinent facts. But it will certainly remain as a part of the court's duty, in the exercise of its *judicial* powers, to determine and decide these pertinent facts.

4. Notwithstanding the lower court's criticism of the act and its conclusions that the same constituted an infringement by the legislative branch upon the functions of the judicial branch, the court proceeds to take up and discuss (R. 55-57) one item of claim, and, apparently *on the evidence in the old case* from which a number of quotations are made, it concludes that *this* item of claim is lacking in merit. In other words, it thus exercises a *judicial* function by a consideration of and a conclusion as to *one* item of claim. Whether or not that conclusion was right or wrong is, of course, not for present discussion. It is mentioned here only as showing that while the court in one breath says that the Act is void because it leaves nothing of a *judicial* nature to be performed thereunder, in the next breath it proceeds *under the act to exercise the very kind of authority* which it says the Act does not confer. If for no other reason, the judgement of the lower court should be reversed.

The question of the constitutionality of the Act was raised by the Court of Claims.

It has been many times decided that the courts meet questions as to the validity of legislation as they are raised, but that they do not anticipate them. The power of a court to declare a statute void as in violation of the Constitution should never be exercised except in a very clear case. *Hylton* v. *United States*, 3 Dallas 171; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Boyd* v. *Alabama*, 94 U. S. 645.

In *United States* v. *Reese*, 92 U. S. 214, it was said that Congress is supreme within its legitimate sphere, but if it steps outside of its constitutional limitations and attempts that which is beyond its rights the courts are authorized, and, when called upon in due course of legal proceedings, must annul its encroachment upon the reserved power of the States or the people.

There are many cases to like general effect. It is to be pointed out that the Court of Claims on its own motion here raised the question and attempted to decide the validity of the Special Act of Congress. Neither party to the litigation had, in the argument of the case, suggested such invalidity.

Present Special Act not Novel.

Since the creation of the Court of Claims cases have frequently arisen where, after final judgment by the court, Congress authorized a new action on the same matter. This is the first time of known record that the Court of Claims has questioned the authority of Congress to do so.

The first of such cases is that of *Nock* v. *United States*, 1 C. Cls. 71; 2 C. Cls. 451.

Nock had a suit in the Court of Claims (1 C. Cls. 71) which was dismissed. Thereafter Congress enacted a Special Act (2 C. Cls. 452) whereby such claim, previously considered and disallowed, "is hereby referred to the

Court of Claims for its decision, in accordance with the principles of equity and justice: *Provided*, That said court do not render judgment for a greater sum than is contained in the report of Solicitor Comstock to the Senate, dated December twenty-two, Anno Domini eighteen hundred and fifty-two."

In the course of its opinion on the claim filed under the Special Act, the court said (2 C. Cls. 457, 458):

> "If the objections were allowed to rest upon the grounds whereon the assistant solicitor has placed them, I apprehend that they would be found fatal to the case. It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial *judicially;* neither have they *reversed* a decree of this court; nor attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objections which defeated a recovery before, but that they thus consent upon the condition that the recovery, if any shall be had, shall not exceed a certain amount. The claimant has no rights here except under this consent, and he limits his demands accordingly. If the court should find a larger amount to be due, the excess would be remitted and judgment entered for the amount demanded in the claimant's petition. Apart from this view of the question, it would be enough to say that the defendants cannot be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first."

The recent case of *De Luca v. United States*, reported 69 C. Cls. 262; 282 U. S. 862; 84 C. Cls. 247, illustrates the hitherto unobjectionable practice.

In the first case (69 C. Cls. 262) plaintiff's petition was dismissed. Certiorari was denied (282 U. S. 862).

Then, there, as here, Congress passed a Special Act giving the Court of Claims jurisdiction to hear and determine and award just compensation for losses and damages, if any, *under the identical matters involved in the prior litigation* "notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made or of *res judicata*, lapse of time, laches or any statute of limitation" with the right of applying for a writ of certiorari by either party.

Thereupon the court reconsidered the same case which it had previously considered and decided, and awarded judgment in plaintiff's favor for over $1,500,000, with interest on a part thereof. The Court of Claims there raised no point that the act was directing *reconsideration* of a matter previously decided; and neither of the parties in interest thought it worth while to bring the matter to the *attention of the Supreme Court*. Why is not the decision in this case parallel to the question now raised?

Many intervening cases of like effect have arisen, of which only a few need to be noted:

Grant v. *United States*, 5 C. Cls. 71; 18 C. Cls. 732; and *United States* v. *Grant*, 110 U. S. 225, are worthy of consideration. In the original suit (5 C. Cls. 71) judgment was awarded for $34,225.14.

Plaintiff was evidently not satisfied with this. Whether the judgment was appropriated and paid does not appear. Thereafter Congress passed a Special Act as follows (18 C. Cls. 738):

> "That the Court of Claims be, and is hereby, directed to reopen and readjudicate the case of Albert Grant and Darius Jackson (doing business as A. Grant and Company) upon the evidence heretofore submitted to the said court in said cause (Fifth Court of Claims Reports, page eighty), and if said court in such readjudication shall find from such evidence that the court gave judgment for a different sum than the evi-

dence sustains or the court intended, it shall correct such error and adjudge to the said Albert Grant such additional sum in said cause as the evidence shall justify, not to exceed fourteen thousand and sixteen dollars and twenty-nine cents; and the amount by re-adjudication in favor of the said Albert Grant shall be a part of the original judgment in the cause recorded in the Fifth Court of Claims Reports, page eighty."

Plaintiff filed a second petition (18 C. Cls. 732, et seq.). An additional award of $14,016.29 was entered.

The Government filed an appeal but this was dismissed by the Supreme Court on the grounds (110 U. S. 225) as stated in the syllabus:

"An Act which directs the Court of Claims to reopen and readjudicate a claim, and in case it finds a further amount due that the same shall be a part of the original judgment, confers no right of appeal from the final action of the court under it; and if the time for the right of appeal from the original judgment has expired before appeal from such final action is claimed and taken, the appeal will be dismissed."

Neither court questioned *the power of Congress* to give the directions embodied in the act.

The case of *McKee (heirs of Vigo) v. United States*, (10 C. Cls. 231; 21 Wall. 648; 91 U. S. 442) is an example of where Congress has not merely given jurisdiction but has directed the basis and extent of judgment. It also goes to show that the Supreme Court may review and did review matters of jurisdiction so prescribed.

The original act referring the matter to the Court of Claims is as follows (10 C. Cls. 232):

"*Be it enacted, etc.* That the claim of the heirs and legal representatives of Col. Francis Vigo, deceased, late of Terre Haute, Ind., for money and supplies furnished the troops under command of Gen. George Rogers Clarke, in the year 1778, during the revolutionary war, be, and the same hereby is, referred along

with all the papers and official documents belonging thereto, to the Court of Claims, with *full jurisdiction to adjust and settle the same;* and in making such *adjustment and settlement* the said court shall be governed *by the rules and regulations heretofore adopted by the United States in the settlement of like cases, giving proper consideration to official acts if any have heretofore been had in connection with this claim,* and without regard to the statutes of limitation."

The court heard the case and entered judgment. The matter first went to the Supreme Court (21 Wall. 648) as to whether a right of appeal existed. The Supreme Court held that it did. It then went to the Supreme Court again (91 U. S. 442) mainly on the matter of interest. It was not questioned in the Court of Claims or in the Supreme Court that Congress had authority to prescribe what the lower court could or should do and how it should be done.

The case of *Roberts* v. *United States,* (6 C. Cls. 84; 15 Wall. 384; 92 U. S. 41; 11 C. Cls. 774) has this significance: A private act which referred the claim to the Court of Claims provided:

"That the said court is hereby directed to examine the same, and determine and adjudge whether any, and, if any, what amount is due said trustees for said extra service."

with a proviso

"Provided, That the amount to be awarded by said court shall be upon the basis of the value of carrying other first-class freight of like quantity with the mails actually carried between the same ports at the same time."

In other words, the proviso was a direction as to the basis upon which the claim was to be considered. The Court of Claims after discussing the proviso, said (6 C. Cls. 89):

"The *proviso* does not militate against this view. It does not limit the previous power to determine and adjudge whether *any* amount is due, but merely indicates the rule of damages, if we determine and adjudge something to be due."

Judge Nott (p. 90) dissented, saying:

"The construction of the court gives no effect to an act of Congress. Congress having passed the private act for the relief of the claimants, with knowledge of the facts, as appears by the reports of their committees, and while the claimants' suit upon the same cause of action was actually pending in this court, must be deemed to have thereby ratified the additional service and referred the claim to this court for the ascertainment of the damages, if any, according to the rule expressly prescribed by the act."

The matter in 15 Wall. 384, had to do with right of appeal. This was sustained.

The case, as appearing in 92 U. S. 41, has this to say of the direction to the court as to basis of judgment (p. 49):

"It is true that Congress did not determine, in express terms, that the parties were entitled to any compensation, but referred it to the court to decide 'whether any, and, if any, what amount is due.' Still we think it is plain that Congress principally intended to refer to the adjudication of the Court of Claims the amount of compensation to which the claimants were entitled, and for that purpose prescribed the principle by which it should be estimated; but even if it was intended to refer the whole subject, the right to compensation, as well as the amount, the claimants, under the circumstances of the case, are, in our judgment, entitled to compensation."

Murphy v. *United States*, 14 C. Cls. 508; 104 U. S. 464; 15 C. Cls. 217; 35 C. Cls. 494. The significance of the case is in this: The original suit (14 C. Cls. 508) was for balances and damages on account of a Navy Department dry dock contract.

The petition was *dismissed*. On appeal to the Supreme Court (104 U. S. 464) the dismissal was *affirmed*, the Supreme Court saying:

> "We are clearly of the opinion that the acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy, in his adjustment of the account presented to him, was equivalent to a final settlement and compromise of all the items of the present claim included in that account."

Thereupon Congress enacted a Special Act providing (35 C. Cls. 495):

> "That the claim of Charles Murphy be *remanded* to the Court of Claims *for a further hearing upon the testimony and papers formerly heard* in said court, and upon such further testimony, including the claimant's evidence, as either party may file, pursuant to the rules of the court; in addition to the authority conferred upon it by existing laws, it shall have equitable jurisdiction of all matters presented by the claimant in his new petition, to be filed within sixty days from the approval of this act; and said court is authorized and directed speedily to render judgment for such amount as right and justice may demand, without reference to any statutes of limitation. And, furthermore, an appeal shall lie from such judgment to the Supreme Court of the United States by either party upon the entire record considered in the Court of Claims (italics added).

In pursuance thereof, the Court of Claims *again* heard the case and in its opinion said (35 C. Cls. 494, 506-507):

> "'The act grants a *rehearing* with *enlarged* jurisdiction and authorizes the court to readjudicate the case 'upon the testimony formerly heard in said court and *upon such further testimony*, including the decedent's evidence, as either party may file, pursuant to the rules of the court,' and 'in addition to the authority conferred upon it by existing laws, it shall have equitable jurisdiction of all matters presented by the decedent

in his new petition,' with authority and direction to speedily render judgment 'for such amount as right and justice may demand, without reference to any statute of limitation,' giving to either party the right of appeal to the Supreme Court 'upon the entire record considered in the Court of Claims.'" (Italics added).

The net result was an additional judgment in plaintiff's favor in the sum of $17,325. Neither party carried the matter further.

The *Murphy* case would appear to be a good precedent for the situation here involved.

The case of *Alcock* v. *United States* (61 C. Cls. 312; 74 C. Cls. 300, 308) is another example of where Congress told the Court of Claims *what to do*. In the original case plaintiff's claim was dismissed. Thereupon a Special Act was obtained which provided (74 C. Cls. 309, 310):

"That the Court of Claims of the United States be, and hereby is, given jurisdiction to hear and determine the claim of John L. Alcock, of Baltimore, Maryland, and to award him compensation for losses or damages, if any, which he may have suffered through action by governmental agencies in commandeering, requisitioning, controlling by compulsion or otherwise, allocating or directing the contracting for, or delivery of, spruce and fir lumber, which he owned or had sold under firm and binding contracts to others than allied Governments; and to enter decree or judgment against the United States for such compensation, with interest thereon, notwithstanding the fact that there was no taking by the United States of any of said spruce or fir lumber for the direct use of the United States, and notwithstanding the contracts made by claimant with representatives of the Governments allied with the United States, and notwithstanding the fact that the United States, or any officer, agent, or employee acting in its behalf controlled, allocated, or directed the delivery of said spruce and fir lumber, or directed or required contracts to be made therefor under color of authority, or committed a tort in doing so."

. . . . . .

> "Sec. 3. * * * Proceedings in any suit brought in the Court of Claims under this act, appeals therefrom, and payment of any judgment therein shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended."

In pursuance of such directions the court *re-heard* the case, reconsidered its prior decision and made an award of $163,247.17, with interest. Neither party carried the matter to the Supreme Court. This case should, it would seem, have precluded the objections now raised.

In *Cherokee Nation* v. *United States*, 270 U. S. 476-486, there had been a prior adjudication (59 C. Cls. 862), awarding judgment with interest at a specified rate. Congress passed a Special Act giving authority to consider the award on a different basis and at a higher rate of interest. The point pertinent here is that the Supreme Court said (p. 486):

> "The power of Congress to waive such an adjudication of course is clear." (Citing *Nock* and numerous other cases).

Still other cases, where the jurisdiction of the Court of Claims was discussed at length, are:

The case of *Pocono Pines Hotels Company* v. *United States* (69 C. Cls. 91; 73 C. Cls. 447; 76 C. Cls. 334).

In the original case (69 C. Cls. 91) the Pocono Pines Company sued and obtained a judgment in the Court of Claims in the sum of $227,239.53. Thereafter, in due course, the judgment went to Congress for appropriation but instead of appropriating for payment of same Congress enacted what it styled "a Congressional Reference" whereby the case of Pocono Pines Hotels Company "is remanded to the United States Court of Claims with compete authority, the statute of limitations or rule of procedure to the contrary notwithstanding, to hear testimony as to the actual facts involved in the litigation and with instructions

to report its findings of facts to Congress at the earliest practicable moment."

The court (73 C. Cls. 447) after reviewing the history of the case, and indeed the history of the Court of Claims and of the cases affecting the Court of Claims' jurisdiction, concluded (p. 500):

> "There was no manifestation of an intent to do the plaintiff an injury, no investigation instigated as to the legality of the court's judgment, no command issued to the court to reverse its conception of the legal principles adjudicated by it, but, on the contrary, as we gather from the reports of the committee and the debates in Congress (citing Congressional Record) the act intended to obtain for Congress certain facts upon which it may determine its legislative course, legislation which Congress deemed essential in view of representations made that it did not have available for consideration sufficient facts necessary for legislative action."

Thereupon in pursuance of the mandate of Congress and in compliance with "a familiar rule of law that courts will avoid in cases of doubt a decision holding a law of Congress unconstitutional" (p. 501), the court proceeded to take further testimony. One of the judges, Judge Green, and the present Chief Justice, then Judge Whaley, dissented.

Thereafter the court made findings (76 C. Cls. 334) reiterating its findings previously made and affirmed the judgment previously rendered. Eventually the amount of the judgment was paid in due course without further question. Neither party went or attempted to go to the Supreme Court for a review of the matter.

Petitioner has gone to some length in thus citing and quoting from a long line of decisions, starting almost from the creation of the Court of Claims and extending down to quite recently, in which Special Acts very similar to, if not broader than, the one here involved have been considered and acted upon by the Court of Claims without question

as to their constitutionality. From such decisions in a number of instances appeals were taken to the Supreme Court and acted upon without question by the higher court as to the constitutionality of the acts involved. It is not understood by the present petitioner why question should *now* be raised as to the validity of the presently questioned Special Act, or as to why the Supreme Court may not, if called upon to do so, review any decision that the lower court might make under said Special Act. Certainly there would seem to be no authority in the decided cases for the question now being raised. The Special Act here questioned was enacted in the light of all that had gone before. On that basis Congress could only suppose that the present act was a proper exercise of the legislative, and no infringement upon the judicial, function.

Has Congress Usurped Judicial Prerogatives?

It may be that the question suggested by the Court for argument is induced by the complaint of the lower court that Congress *has itself exercised*, or by the Special Act *attempted to exercise*, whatever there is of *judicial function* pertaining to the instant case. And as all judicial power, under Article III is vested in the courts, *not* in Congress, it would follow, if this were true, that the Special Act goes beyond what the Congress may constitutionally do, and hence the present action may not be reviewable by this Court under Article III.

But Congress has not exercised, or attempted to exercise, a judicial function, and nothing in the Special Act is susceptible of such a construction. It may be that Congress was persuaded that petitioner has some just moral or equitable claims. The Committee reports lend support to this conclusion. But Congress did not "overrule" the Court of Claims in denying allowance of such claims, or "direct a new trial." It only *validated* certain claims and gave the petitioner a *new cause of action* thereon, with a *new jurisdiction* to the Court of Claims to hear and determine same.

on the evidence in the old case and such additional proofs as might be offered. Surely the Congress has not performed, or attempted to perform, any act that involves the exercise by it of any other than a purely legislative function. The court is merely given jurisdiction to hear a new case, to decide it, and to render such judgment as the facts warrant. What, possibly, could be wrong about this?

Rights of Congress.

The Court of Claims being a creature of Congress is subject to any proper direction from Congress. *United States* v. *Klein*, 13 Wall. 128, *DeGrott* v. *United States*, 5 Wall. 419; *Williams* v. *United States*, 289 U. S. 552.

Congress surely has the right to create by statute an obligation against the United States even though none without such act existed. That is what was done here, nothing else.

It was not and is not for the Court of Claims to question the *methods* followed by Congress in arriving at the conclusion that this petitioner had or has a just cause of action. *United States* v. *DeMoines Navigation & Railway Co.*, 142 U. S. 510; *Calder* v. *Michigan, Ex rel.*, 218 U. S. 591; *James Everard's Breweries* v. *Day*, 265 U. S. 545.

Nor is it for the courts to give forced meaning to the words of a statute or make a strained construction of legislative enactments. *United States* v. *Appalachian Electric Power Company*, 23 Fed. Supp. 83, affirmed 107 Fed. (2d) 769, reversed on other grounds 311 U. S. 377.

Congress possesses the sole right to say what shall be the form of proceedings, either in equity or at law, in the Courts of the United States and in what cases an appeal shall be allowed. *City Bank of New Orleans Ex parte*, 3 How. 292; *Wayman* v. *Southard*, 10 Wheat. 1.

In *Simms* v. *Hundley*, 6 How. 1, it was held that the rules of evidence established by a State statute are to be followed by the courts of the United States when sitting in that State.

In *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 94 U. S. 457, it was held that the rules of evidence as enacted by Congress prevail in the courts of the United States over the rules of the State in which the trial is had.

In other words, it seems to be the settled rule that the *legislative* branch of the Government may prescribe and direct the rules of evidence to be applied. The Court of Claims has taken exception to the alleged fact that Congress in the Special Act indicated something of a rule of evidence to be followed as to certain items of claim. It seems always to have been held that Congress may properly do just exactly this.

The courts naturally cannot enlarge or deflate their own authority. That is a legislative function (*The State of Rhode Island* v. *The Commonwealth of Massachusetts*, 12 Pet. 657). As said by the court in that case (p. 721):

> "In obedience to the injunction of the constitution, Congress exercised their power, so far as they thought it necessary and proper, under the 17th clause of the 8th section, 1st article, for carrying into execution the powers vested by the constitution in the judicial, as well as all other departments and officers of the Government of the United States; 3 Wheat. 389. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; 1 Wheat. 326; 4 Wheat. 407, leaving the details to Congress, in whom was vested, by express delegation, the power to 'pass all laws necessary and proper for carrying into execution all powers, except their own.' The distribution and appropriate exercise of the judicial power, must therefore be made by laws passed by Congress, and cannot be assumed by any other department; else, the power being concurrent in the legislative and judicial departments, a conflict between them would be probable, if not unavoidable, under a constitution of government."

And further on (p. 723) the court added:

"We must presume that Congress did not mean to exclude from our jurisdiction those controversies, the decision of which the States had confided to the judicial power, and are bound to give to the constitution and laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions."

II. *The decision of the lower court that the Special Act here involved is unconstitutional, is of a nature, regardless of other circumstances, which admits of a review by this Court under Article III.*

The Court of Claims has here decided that an act of Congress is unconstitutional. It would seem scarcely open to argument that whether the court was right or wrong, i. e., whether the act is or is not constitutional, is a question that is squarely within the province of this Court to decide under Article III of the Constitution. Such indeed is one of the matters specially assigned to this Court by the provisions of the Constitution for final determination.

This proposition would seem not to require the citation of authorities. It is elemental and fundamental. The Supreme Court is the one body in our system of Government that has the right of final decision as to whether an act of Congress is or is not valid under the Constitution.

III. *Even if the Special Act were unconstitutional in part, it would still remain that the Special Act is entirely constitutional and valid in giving the Court of Claims jurisdiction to perform a specified task.*

It is not conceded—in fact it is earnestly denied—that any part of the Act is unconstitutional for any reason. As hereinbefore pointed out, the Special Act conferred judicial functions, which under the applicable laws are reviewable by this Court. That part of the Act giving the parties the right of applying for a writ of *certiorari* from any decision made by the Court of Claims is therefore valid.

The Court of Claims is a *legislative*, not a *constitutional* Court. As such it is peculiarly subject to legislative requirements.

Ex Parte Bakelite Corporation, 279 U. S. 438, 449, after reciting the purport of Article III of the Constitution and stating that the inferior courts created under that article are not the only courts that may be created by Congress, others being established under other provisions of the Constitution, the Court said (p. 449):

> "But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior."

At pp. 452, 453, with particular reference to the Court of Claims it was said:

> "Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them."
>
> "The Court of Claims is such a court. It was

created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies."

"For sixty-five years following the adoption of the Constitution Congress made it a practice not only to determine various claims itself but also to commit the determination of many to the executive departments. In time, as claims multiplied, that practice subjected Congress and those departments to a heavy burden. To lessen that burden Congress created the Court of Claims and delegated to it the examination and determination of all claims within stated classes. Other claims have since been included in the delgation and some have been excluded. But the court is still what Congress at the outset declared it should be—'a court for the investigation of claims against the United States.' The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress."

Further on (p. 454) it was said:

"In *Gordon* v. *United States*, 117 U. S. 697, and again in *In re Sanborn*, 148 U. S. 222, this Court plainly was of opinion that the Court of Claims is a legislative court specially created to consider claims for money against the United States and on that basis distinctly recognized that Congress may require it to give advisory decisions. And in *United States* v. *Klein* 13 Wall. 128, 144-145, this Court described it as having all the functions of a court, but being as respects its organization and existence, *undoubtedly and completely under the control of Congress*" (italics added).

The decision of this Court in *Williams* v. *United States*, 289 U. S. 553-565, definitely decided that the Court of Claims

is a legislative court subject to the will of Congress. The Court there said (p. 565):

> "By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained, or concurrent jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution."

And again (pp. 579, 580, 581):

> "Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, *Bakelite* case, *supra*, pp. 452, 458, they are, of course, matters in respect of which there is no constitutional right to a judicial remedy, *United States* v. *Babcock*, 250 U. S. 328, 331; and the authority to inquire into and decide them may constitutionally be conferred on a nonjudical officer or body."

> "The view under discussion—that Congress having consented that the United States may be sued, the judicial power defined in Art. III at once attaches to the court authorized to hear and determine the suits—must, then, be rejected, for the further reason, or, perhaps, what comes to the same reason differently stated, that it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands*, 277 U. S. 189."

201-202. And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers. Compare *Kilbourn* v. *Thompson*, 103 U. S. 168, 190-191."

Congress is presumed to know the law, and is presumed therefore to know that the Supreme Court will not review the exercise by lower courts of a non-judicial function, and that any attempt to so provide would be invalid and unconstitutional. It is well established that courts will endeavor to construe a statute so as not to strike it down because it is unconstitutional (cases cited *supra*). The application of these principles must lead to the consideration that since Congress in providing in the Special Act that either party might apply for a review by the Supreme Court, it is intended, and did in fact intend, only to create new obligations of the United States, waive certain defenses and then confer jurisdiction upon the Court of Claims to adjudicate the rights of the parties upon the basis of those obligations, which it had created and the defenses to which it had waived.

But, regardless of the validity of that provision; it is submitted, that the other provisions are valid and proper and should be upheld.

Provisions Separable.

An Act containing separable provisions may be constitutional as to some though void as to other.

In *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 635, it was held:

> "It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565, it was said:

> "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced."

See also *Champlin Rfg. Co. v. Commission*, 286 U. S. 210.

Conclusion.

From all the cases which petitioner has been able to examine, it is his conclusion:

1. The Special Act here involved gives to the Court of Claims only a jurisdiction to hear and determine questions which are properly reviewable by this Court under Article III of the Constitution.

2. The decision of the lower court declaring an act of Congress to be void for lack of constitutionality is one that under Article III of the Constitution and otherwise is clearly reviewable by this Court.

3. The provisions of the Special Act are separable and even if one part were invalid, which is denied, other parts may properly be held to be valid. The Special Act creates a new cause of action, with a new liability. It is for the lower court to determine and decide the new case so presented.

4. The Court of Claims has itself recognized that the act did confer upon it matters for decision that call for the

exercise of judicial power and it acted under the authority so conferred by passing upon the merits of one item of claim referred by the Special Act.

5. The Special Act involved no assumption by Congress of matters within the province of the Courts, not Congress.

It is respectfully submitted that the judgment and decision of the Court of Claims should be reversed and the case remanded with direction to the court to proceed in accordance with the requirements of the Special Act.

6. The issues presented involve a case which is reviewable under Article III because (1) it is a "case" in the legal sense of Article III in that, as between adverse parties, it was brought to issue in the lower court and there judicially decided against the constitutionality of the Special Act confirmed by order of dismissal, a final judgment; because (2) the action arises under the Constitution and (3) is a controversy to which the United States is a party.

Respectfully submitted,

GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
Attorneys for Petitioner.